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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1072

E. E. SWALLEY,
Petitioner-Plaintiff,

vs.

ADDRESSOGRAPH-MULTIGRAPH CORPORATION,
Respondent-Defendant.

REPLY OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI.

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To the Honorable The Supreme Court of the United States:

STATEMENT.

Petitioner's summary statement of the case is insufficient and confusing. We believe this court is entitled to a complete understanding of the facts and we will, therefore, undertake the task of giving the court this understanding, which the petitioner has failed to do.

The petitioner was employed as a Sales Agent for respondent in March of 1941 for the state of Alabama and certain enumerated counties in Florida. He resigned his employment in March of 1943. The petitioner brought this action to recover, among other things, commissions which he alleged to have been due him under the Sales

Agency Contract on sales to the United States of America, War Department, Air Corps, covered by three purchase orders Nos. 42-15979, dated March 31, 1942 (R. 281); No. 42-19531-P, dated May 18, 1942 (R. 289); and No. 42-19532-P, dated May 20, 1942 (R. 295).

The petitioner's cause of action as contained in his complaint sought the entire commission on the products covered by the above described War Department purchase orders, but on the trial of the case, the evidence established that these War Department purchase orders were not procured by the petitioner, but were procured by the respondent's Sales Agent in Dayton, Ohio. The trial court found that the petitioner had not made the sales and denied the petitioner the entire commission, as claimed, and the petitioner took no appeal from this decision. The trial court, however, found that the petitioner was entitled to 75% of the entire commission on these three purchase orders, based on the sale by the respondent's Sales Agent in Dayton, Ohio. The respondent took an appeal from this judgment and the Circuit Court of Appeals, in reversing the judgment of the District Court, held that the petitioner was not entitled to any portion of the commission on these three orders.

The Agency Contract (R. 246) contained a provision providing for the splitting of the entire commission where the sale was made by an agent in one territory, but the equipment sold was for use and to be used in another agent's territory. Under such circumstances the contract provided that 25% of the entire commission would be payable to the agent making the sale, and 75% of the entire commission to the agent in the territory where the equipment was to be used (Par. 8 of the Contract, R. 248).

It is to be noted that this provision is contrary to the ordinary commission contract where the entire commission

is paid to the agent actually making the sale, regardless of where the equipment sold is actually shipped. The reason for this variation from the ordinary commission contract and the justification for giving 75% of the entire commission to an agent who participated in no way in making the sale, and in whose territory the sale was not made, is explained by the fact that the agent in whose territory the machines are to be used has the expense of installing these machines, training the customer's employees in the operation of the machines and servicing the machines for the customer as such service is required (R. 54, 58, 59, 62, 63, 64, 66, 173-175, 199-200). The respondent's standard order form which was used by all agents and by this petitioner during all times he was employed by the respondent and which each agent, including this petitioner, was required to sign at the time that an order was taken, contained a clause wherein the agent is required to state the place where the equipment will be "kept and installed" (R. 312; R. 316).

Prior to October of 1941, the War Department began making substantial purchases of equipment on their own special forms calling for delivery to Army Depots for temporary storage. The machines, when delivered to these Depots, were not required to be installed or maintained, nor was there any requirement for the training of operators, since these obligations would not arise until the machines were reshipped from the Depots to some activity for actual use. The respondent, to remove any doubt as to the right to commissions on such sales, issued a bulletin to all of its agents, including the petitioner, dated October 31, 1941, which provided in part as follows:

> "2. When equipment is shipped from factory to an Army Depot, it is considered as 'in transit' and Sales Agent in whose territory that General Depot is located will be entitled to no commission and quota

credit, for obviously such equipment will not be installed for use at the Depot, and War Department will decide where that equipment is to go.

"3. On shipments where final destination is not known, as to General Depots, the 75% share of the commission will be carried on company's books as a liability and paid later when it is definitely ascertained who is entitled to this commission." (Respondent's Ex. 18, R. 309.)

The three purchase orders from the War Department, Army Air Force, involved in this case as above noted were not received until March 31, 1942, May 18, 1942 and May 20, 1942, respectively. They were obtained by the respondent's Sales Agent at Dayton, Ohio, which was outside the petitioner's territory, and the respondent's Dayton agent was paid 25% of the entire commission (R. 152, 192). The officers who executed the purchase orders on behalf of the War Department had never dealt with or heard of the petitioner (R. 141, 142). The purchase orders called for shipments of equipment to six Army Depots located throughout the United States, only one of which was the Mobile Depot which was located in petitioner's territory. The Army Air Force intended that the shipments to the Depots were for the purposes of temporary storage until such a time as the equipment would be needed at the various air fields, air bases and training centers for use therein, at which time the equipment would be reshipped to such activities (R. 140). The equipment, when it reached the Mobile Air Depot, was not removed from its original shipping crates (R. 137). The final disposition and use of this equipment remained under the control of the Air Service Command at Dayton, Ohio, who ordered the reshipment of this equipment from the temporary storage Depots to the activity at which the equipment would be used (R. 138). Under such order from the Air Service Command, some

of the equipment covered by the above described three purchase orders was reshipped from the Mobile Depot to the air bases, etc., located in petitioner's territory, which equipment was installed by petitioner for use and he thereupon claimed and was paid 75% of the entire commission, or a total of $6,324.94. As to the other machines shipped under the above described three purchase orders to the Mobile Depot (which storage Depot supplied five states which were not included in petitioner's territory (R. 136-137)), these machines were installed by the agents in territories other than petitioner's and they were paid the remaining 75% of the entire commission. The commission which the petitioner claims in this case is on the equipment sold under the above described three purchase orders, which was temporarily stored in its original shipping crates in the Mobile Depot and thereafter, on direction of the Air Service Command at Dayton, Ohio, reshipped out of the Mobile Depot and into the territory of other Sales Agents of respondent and by them installed for use in their territories.

A short time after the above described three purchase orders from the War Department had been obtained in Dayton, petitioner learned of the orders and telephoned Mr. Hitchcock, a Sales Manager of the Multigraph Division of respondent, and during that conversation asked Mr. Hitchcock if petitioner would get a commission on any machines that remained in storage in the Mobile Depot for ninety (90) days, to which Mr. Hitchcock replied that he would not; that commissions on these machines would be paid when they were installed for use (R. 160, 115, 126); and Mr. Hitchcock further stated that the machines were shipped into the Depot for storage and for all practical purposes were in transit and "that the work had to be done after the machines were sent to the activity and in-

stalled for use, and that in fairness to all our other men who really had to do the work, and in line with the way we had handled similar situations that was the way we were going to handle this" (R. 161). Petitioner made no protest nor expressed any objection or disagreement with this statement.

Shortly after shipments were being started under the above described three purchase orders of the War Department, a second bulletin was issued to the agents under date of September 21, 1942 reiterating the manner of distribution of commissions on such orders as stated in the October 31, 1941 bulletin (Def. Ex. 7, R. 302). This bulletin also set up a procedure for the agents to follow in making requests for commissions when machines covered by the above described three War Department purchase orders were actually installed. The petitioner expressed no objection or disagreement with the terms of this bulletin and subsequently made claims for commissions on the forms provided for machines covered by the above described three War Department purchase orders for machines actually installed by him in his territory; and petitioner made no request for commissions on any machines which were merely in temporary storage in the Mobile Depot (R. 43, 117). In one instance, the petitioner claimed and was paid a commission on a machine which was covered by one of the above described three War Department purchase orders which had been originally shipped to the Middleton Army Depot (which was located outside petitioner's territory) and was subsequently reshipped from that Depot into petitioner's territory and installed by him therein (R. 298). Under the theory advanced by petitioner for recovery in this case, that commission should have been payable to the agent in whose territory the Middleton Depot was located but, nevertheless, the petitioner claimed and was paid this commission in the sum of $1,075.00 (R. 100, 101, 298).

The respondent furnished petitioner monthly statements on which were shown all of the debits and credits to petitioner's account each month, including commissions credited, and each commission credit was supported by an invoice identifying the particular transaction for which the commission was paid (R. 210, 217). The petitioner was given credit for 75% of the entire commission on all machines covered by the above described three purchase orders which were installed by him for use in his territory (R. 219), but petitioner was not given credit for any commission on machines shipped to the Mobile Depot for storage (R. 219). The petitioner never objected to the balance of his account as shown on each of these monthly statements (R. 220), although petitioner did not resign until March of 1943 (R. 105).

ARGUMENT.

The decision of the Circuit Court of Appeals is found in 158 Fed. (2d) 51. A consideration of the grounds upon which the Court of Appeals' opinion was based discloses clearly that there are no questions presented in the petition for the writ of certiorari of such character as to require determination by this court and that the petition fails to present any recognized ground for the exercise of the jurisdiction of this court under the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

I.

The Court of Appeals Properly Stated the Ohio Law, Which Controls in This Case, to Be That If the Words and Terms of a Contract When Given Their Ordinary and Usual Meaning, Are Plain and Clear, There Is Neither Room Nor Right for Any Court to Attempt Construction.

The Court of Appeals in its opinion said at page 54,

> "* * * We think that the contract is not ambiguous and that the words 'use' and 'to be used' are to be given their ordinary meaning: 'to employ; * * * to put into operation; to cause to function.' See Webster's New International Dictionary, Second Edition, 1941. The words 'use' and 'to be used' as employed in this contract are not synonymous with storage" (R. 379).

The agency contract provided that it should be interpreted according to the laws of Ohio (Paragraph 10-J (b), Plaintiff's Exhibit 3, R. 253-254) and the court's opinion as above stated is completely in accord with the applicable laws of Ohio as evidenced by the following cases:

First National Bank v. *Houtzer*, 96 Ohio St. Rep. 404, 117 N. E. 383.

In this case, the Court said at page 384:

> "If the words and terms of the contract are plain and clear, there is neither room nor right for any court to attempt construction. The parties under the issues in this case are presumed to have intended to contract in the manner and form in which they did contract. They are presumed to have intended to have given to the language of the contract *the ordinary and usual meaning given to such language.*" (Italics ours.)

Thompson Heating Corporation v. *Hardware Ind. Ins. Co. of Minn.*, 74 Ohio App. 350, 58 N. E. (2d) 809.

In this case, the Court said at page 811:

> "It is fundamental that the intent of the parties, when ascertained, will control. If not ambiguous or uncertain, the express terms and plain language as ordinarily understood will be given effect as revealing the intention of the parties. If that intention be clearly revealed, there is no room for the application of rules of construction necessary in searching for the meaning of ambiguous language. No new or changed contract is to be arrived at either by ascribing finely drawn connotations to simple terms or by disregard for the simplicity or plainness of terms used."

This interpretation of the agency contract and the word "use" is likewise in accordance with decisions of the Supreme Court of the United States. See *Billings* v. *United States*, 232 U. S. 261, and *Pierce* v. *United States*, 232 U. S. 290.

If the word "use" should be construed in the manner contended for by petitioner it would obviously enlarge the undertaking which the respondent clearly assumed and intended to assume. This is so because the respondent would not only have the obligation to pay twenty-five per cent of the entire commission to the agent who made the

sale and seventy-five per cent of the entire commission to the agent in whose territory the machines were actually installed for use after reshipment from the Army Depot, but also an additional seventy-five per cent of the entire commission to the agent in whose territory the machines were shipped for temporary storage but were not to be used therein. Taking the commission rate as provided in the commission schedule as thirty-five per cent, this would mean that defendant's obligations for commissions would be increased to a rate of 61 25/100 per cent instead of the thirty-five per cent rate as provided in the contract, because defendant would be required to pay one hundred seventy-five per cent of the commission set forth in the schedule rather than one hundred per cent of the commission set forth in the schedule. As was said in the case of *Welsbach Engineering & Management Corp.* v. *Commissioner of Internal Revenue,* 140 Fed. (2d) 584 at page 587:

> "The court will not construe a contract in conflict with the plain and accepted meaning of the language used; or add words to a contract the meaning of which is clear; or hold a covenantor beyond his undertaking."

II.

If There Had Been Any Ambiguity in the Contract Such as to Require Construction, the Court of Appeals Properly Found That Under the Law of Ohio the Construction Placed Upon the Contract by the Parties Themselves and Acted Upon by Them Should Be Followed by the Court.

The Court of Appeals in its opinion stated,

> "No sounder guide to the contract's meaning can be found than the interpretation of the parties themselves." (R. 380.)

This statement of law with respect to construction of contracts is in full accordance with the law of Ohio as evi-

denced by the case of *Commercial Credit Co.* v. *Standard Baking Co.*, 45 Ohio App. 403, 187 N. E. 251, wherein the court said at page 252:

> "Parties may contract and construe their own contracts. Their acts are indicative of that construction, and it little behooves the law in such case to otherwise make a contract for the parties."

This same rule of contract construction is indicated by the language from the case of *Lowrey* v. *Hawaii*, 206 U. S. 206, wherein the court said at page 222:

> "There is no surer way to find out what parties meant than to see what they have done."

The construction placed upon this contract by the Court of Appeals as indicated by the conduct of the parties was a sound construction as evidenced by the following discussion of this point at pages 53-54 of the decision:

> "Before the Army Air Corps adopted the policy of sending machines and attachments to depots for storage, the defendant sent to the plaintiff and its other sales agents a bulletin stating that such machinery and attachments ordered to Army depots would be considered in transit and no commission thereon would be paid agents such as the plaintiff until the equipment was shipped out of storage into their territory to be installed, which of course would entail the duty on the part of the plaintiff and others similarly situated to install the machinery, train the operators, and service the machines.
>
> "The plaintiff made no objection to this interpretation or modification of the contract but operated under it and received over six thousand dollars' commission in reliance thereon. Each month the defendant submitted to the plaintiff a statement of the debits and credits in his account, to which were attached invoices explanatory thereof. These statements were accepted without objection by the plaintiff.
>
> "The plaintiff was paid not only 75% of the total commission on all the machinery installed in his terri-

tory that had been shipped from the Mobile Depot, but he also received commission on a machine shipped into his territory from a depot in Middletown, Pennsylvania (R. 378).

* * * * *

"Since the meaning of the word 'use' as we have defined it above was placed thereon by the defendant in a bulletin sent to the plaintiff and other sales agents before the three orders here involved were obtained, and since it applied to the contract in question, to which meaning the plaintiff not only did not object but accepted and continued to work under, a construction of the contract in accordance with said bulletin was placed thereon by the parties themselves." (R. 380.)

III.

The Contract Between Petitioner and Respondent Was Terminable at Will by Either Party and Therefore Subject to Modification at Any Time by Either Party as a Condition of Its Continuance.

The Modification of the Contract by Respondent (If the Court Finds It Was a Modification Thereof) Which Provided That the Petitioner and All Other Sales Agents of Respondent Would Not Receive Any Commission on Machines Shipped to Army Depots for Storage While in Transit to the Territories Where They Were to Be Used, Was Accepted, Acquiesced in and Acted Upon by the Petitioner.

The decision of the Court on the question of modification appears in 158 Fed. (2d) 51, at page 54:

"Furthermore, since the contract was one terminable at the will of either party, it therefore could be modified at any time by either party as a condition of its continuance. The interpretative bulletin which stated

that goods shipped for storage were considered in transit and the 75% of the total commission would be paid only when the machines were ordered out of storage and installed for use in the agent's territory was accepted by the plaintiff and used as a basis of continued employment. The contract therefore was modified by the parties to meet the terms laid down in that bulletin. The cases are legion and uniform which sanction that proposition." (R. 380.)

The following cases are cited in answer to objection raised by petitioner to the application of the rule in this case:

American National Ins. Co. v. *Teague*, 237 S. W. 248 (Tex.).

Balfour Company v. *Brown*, 110 S. W. (2d) 104, 106-107 (Tex.).

Curtiss Candy Co. v. *Silberman, et al.*, 45 Fed. (2d) 451, 452-453.

Donnellan v. *Halsey, et al.*, 176 Atl. 176, 177-178 114 N. J. L. 175.

Flint v. *Youngstown Sheet & Tube Co.*, 143 Fed. (2d) 923, 924-925.

Linder v. *Midland Oil Ref. Co.*, 40 Pac. (2d) 253, 254, 96 Colo. 160.

Moore Coal Co. v. *Brown*, 64 S. W. (2d) 3, 166 Tenn. 516.

Norton v. *Inhabitants of Town of Brookline*, 63 N. E. 930, 931, 181 Mass. 360.

Page v. *Thomas Kay Woolen Mill Co.*, 123 Pac. (2d) 982, 984, 168 Ore. 434.

Robinson v. *Phillips Petroleum Co.*, 54 Pac. (2d) 322, 323, 175 Okla. 640.

Shiloff Grocery Co. v. *Eberline*, 202 N. W. 86, 199 Ia. 562.

Southern Sav. Bank v. *Dickey*, 199 S. E. 546, 549, 58 Ga. A. 718.

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Wakefield v. *Champlain Marine Co.*, 13 Atl. (2d) 183, 111 Vt. 243.

White Sewing Machine Co. v. *Shaddock, et al.*, 95 S. W. 143, 144, 79 Ark. 220.

39 Corpus Juris., page 48.

In the case of *Flint* v. *Youngstown Sheet & Tube Co.*, (N. Y.) 143 Fed. (2d) 923, there was doubt as to whether the letter of the employer regarding the terms of the contract constituted a modification or an interpretation. The Court said at pages 924-925:

> "The present litigation is the result of a disagreement between the parties as to the meaning of the contract; the plaintiffs assert that it entitled them to commissions on all goods shipped by the defendant into their territory, while the defendant says that it is bound to pay only on shipments which filled orders obtained by the plaintiffs.
>
> * * * * *
>
> "The final point relates to the charge respecting the letter of March 13, 1941, in which the defendant informed the plaintiffs that commissions will be paid 'only on such tonnages as are covered by orders which you send in to us yourselves, or in such cases as are evident that you have arranged for the customer to submit the inquiry and order direct to us.' The instruction given was correct, for the agency contract was terminable at will, and, if the plaintiffs were not content with the defendant's modification of it, if the letter was a modification, they should have refused to go on."

IV.

As to the Errors in Facts and Arguments Presented in Support of Petition.

The facts cited from the record, presented in the statement of facts in this reply, indicate the errors in statements of fact made by petitioner, the omission of other material facts in the record which were ignored by petitioner, and the erroneous conclusions and arguments based upon the errors and omissions. However, in view of the effort to present prejudicial conclusions, we beg the indulgence of the Court to refer to some instances of petitioner's arguments injected into his case where the questions at issue on the trial related to the determination of the commission the plaintiff was entitled to receive, and the respondent was required to pay *to the petitioner* under the agency contract.

A.

In the brief in support of the petition (page 41) it is said:

> "It is ironical, indeed, that although the commissions sued for were set aside by the Company in a special fund and carried on the Company's books as a *liability* (R. 157, 193), and the purchase price of the machines paid by the Government undoubtedly included Plaintiff Swalley's commissions, *said commissions have not in fact been paid by the Company.* It is submitted that such conduct on the part of the Company constitute *bad faith* not only toward Plaintiff Swalley and the other agents, but also toward the United States Government, which should not be countenanced by this Court."

The commissions were carried on the books as a liability not for Swalley but for the agent who would become entitled

to the commissions by reason of services performed by him on machines which were to be used in his territory. The statement that commissions had not been paid is repeated elsewhere, but nowhere is there a citation to any evidence to support said statement.

The finding of fact by the District Court is cited but that finding of fact is contrary to all evidence on that subject in the record. It is contradicted both by the testimony of the plaintiff and the defendant's witnesses.

Before the trial, plaintiff's counsel moved for the production of documents. By agreement of both parties, an order was entered that plaintiff's motion for production of certain documents "have the same force and effect as a notice served upon the defendant for the production of the documents therein specified at the time of the trial" (R. 45).

In compliance with said motion, defendant produced at the trial and turned over to the plaintiff's counsel the original Requests for Commission from various agents, and also the Mechanical Service Installation Reports signed by the customer and sent in from the various agencies showing that the machines did *not* remain in the Mobile Depot, but that they had been removed from storage there and transferred to the air bases which were in the territories of agents other than the plaintiff and there installed for use, and that the commissions were claimed by the various agents in whose territory the machines were installed for use, as well as Mr. Swalley who was paid commissions on machines for use or used in his territory.

An adjournment was taken to permit counsel for plaintiff to examine the numerous original documents received from the various agents who had made the installation of those machines in the territories other than Swalley's, and after counsel had finished his examination of the documents, he stated: "I don't consider it to be a type of evidence that should be offered." (R. 224.)

That these machines were shipped from the Mobile Depot and commissions upon same were paid to other agents was further supported in the record by plaintiff's own testimony, as follows:

"'Q. You know, do you not, that some of the equipment which was shipped under the purchase order dated March 31, 1942, and delivered to the Mobile air depot, was actually later shipped into other agents' territory and installed for use in those territories?

"'A. Yes, sir. (R. 117.)

• • • • •

"'Q. And you do know that the agents in the other territories would be filling out Forms 135 and making claim for seventy-five per cent of the commissions after they installed the machines, didn't you?

"'A. Yes, I thought they would do that.'" (R. 118.)

• • • • •

"'Q. And you made such claims yourself with respect to machines shipped into your territory from other air depots, didn't you?

"'A. On one occasion I think I did. *I did not notice where it came from;* I don't know whether it had been in this territory over ninety days or not.

"'Q. But you made the claim anyway for the commission?

"'A. Yes.

"'Q. And were allowed it? You made the claim and were allowed it, were you not?

"'A. Yes, I was allowed it.'" (R. 118.)

(In Swalley's "Request for Commission" on the machine to which he referred and on which he received $1,075 on the promise made in the bulletins, he stated that he received the machine "from Air Depot located at *Middletown*, Pa.", "Signed—E. E. Swalley, Sales Agent.") (R. 298.)

Mr. Hitchcock testified:

"Mr. Aitken: Q. At a later date were commissions credited to various agents for the machines which were shipped into a particular depot under 15979?

"A. Yes, as the machines were installed for use.

"Q. And how were you advised, Mr. Hitchcock, when those machines were installed for use? What did the agent do? What did Mr. Swalley do, for instance?

"A. We had a form, No. 135, which gave us the necessary information to let us know the equipment was installed at a certain activity. We also had a mechanical service installation report, which was signed by the customer and sent in from the agency.

"Q. And upon receipt of the form No. 135, what did you do?

"A. Upon receipt of No. 135 and the installation report, we would issue credit to that agent for whatever commission he had coming on the deal." (R. 154.)

He further testified:

"Q. Now, Mr. Reeve asked you about the operation of the account known as 99-C of the defendant company. After a credit was made to 99-C where machines were shipped for storage, then was that account paid over to the various agents in whose territories the machines were ultimately installed for use?

"A. *It was.*" (R. 201.)

Petitioner ignoring the record relies upon the unsupported finding of the trial court, which was contrary to the undisputed evidence in the record, to sustain the erroneous statement and his arguments based thereon.

B.

As to Petitioner's Exhibit 16 (the Letter of Mr. Hisney) and Exhibit 47 (Mr. Swalley's Letter).

Petitioner Construed the Words "for Use" and "to Be Used" in His Territory Precisely and Identically as the Words Were Construed in the Two Bulletins of the Respondent and in the Opinion of the Circuit Court of Appeals (Ex. 47, R. 265).

Not only did the petitioner by his acts in claiming commissions based upon the interpretation contained in the bulletins that no commissions would be paid for machines shipped to an Army Depot for reshipment until it could be determined which agent would be entitled to the commission by reason of the installation in his territory, but petitioner in his letter (Ex. 47, R. 265) construed the words "for use" and "to be used" in the contract and gave them the same construction as the respondent gave in the two bulletins and the same construction that was adopted by the Circuit Court of Appeals.

In petitioner's Ex. 16 (R. 259) and Ex. 47 (R. 265) it appears that the Dayton agent sold on an individual order (R. 163) a machine which was represented to be for use in the Barksdale Field (R. 162), which was an active air field and not an Army Depot, and so the commission was credited and later paid to the agent in that territory.

The machine not having been used and after having remained uncrated in the Barksdale Field for more than ninety (90) days, was reshipped into Swalley's territory. Mr. Swalley disputed the right of the agent in the Shreveport territory to the 75% of that commission he had received and construed the words "to be used" in the contract as meaning that he (Swalley) "will have to do the entire job of installing, training, educating and servicing this

equipment" (Pet. Ex. 47, R. 266), and pointed out that it would be an injustice to allow the 75% of the commission to an agent whose only claim for the commission was that it had remained in his territory in storage for more than ninety days, while Mr. Swalley, in whose territory the machine had been shipped for use after the ninety-day period was required to install and service the equipment.

Mr. Hisney, acting for the Company in accordance with the provision in the contract (R. 249) which provided for the settling of disputes between sales agents, gave his decision against Mr. Swalley's contention on May 26, 1941, and allowed the Shreveport agent to keep the 75% of the commission which had been credited and paid to him. It is to be noted that the commission on the shipment to the Barksdale Air Field differs from the claim for commissions in this case, in that the machines on which petitioner claims commissions were shipped to an Army Depot for temporary storage until the destination of the air fields where they were to be used had been determined, while the claim referred to in Exhibits 16 and 47 was based upon commissions on an individual order which had been sold and shipped "for use" in Barksdale Field (R. 162-163) but not actually used there.

Mr. Swalley should have been the first to approve a construction which he had suggested as a fair and equitable interpretation. Whether he approved or not, he hastened to profit through it and collected commissions not only on all machines shipped from Army Depots for use in his territory, but he continued to earn and collect considerable sums in commissions on sales made by himself and by other agents on machines to be used in his territory (R. 47). He should have been content working under a contract interpreted by the bulletins to assure to all the salesmen the right to commissions, which he had advocated and was himself collecting from Account 99-C. But he disclosed

(after the termination of his contract) that all the time he was not only working and collecting under the contract as it had been interpreted by him and by the bulletins, but he was also (as now argued by his counsel) piling up another claim against the Company upon an interpretation that looked the contrary way, which was in fact the very same interpretation he had so earnestly opposed.

The inconsistency of petitioner's position is sought to be screened from view by the claim that petitioner is only asking commissions which counsel gratuitously and erroneously assume the respondent withheld from the other agents.

C.

The Pleading of the Bulletins.

Counsel assume that the bulletins should not have been considered by the Circuit Court of Appeals as constituting interpretation of the contract, and argue that they were not pleaded as a modification of the contract because the word "modification" was not employed to designate the effect of the bulletins.

The only claim in plaintiff's complaint as amended is the claim as stated by the District Court, that the plaintiff *procured* the three "War Department orders" and was, therefore, entitled to the entire commission of 35% promised to the agent who procured the sale of machines "for use" in his territory (R. 326).

In view of the fact that the plaintiff did not procure the War Department orders and that he was unknown to the Army Purchasing Agents (R. 141-142) and not knowing just what claim might be relied on, it was deemed advisable to set out in defendant's answer all the facts and circumstances in order to show that the plaintiff had been paid in full and had no legitimate claim for commissions from defendant.

As to the first bulletin, it was alleged to contain "information and instructions relating to future sales" to the War Department (R. 18, 21), the second bulletin was pleaded (R. 19), and both bulletins were set out in *haec verba* (R. 30, 33), the fact that the contract was terminable at will was pleaded (R. 28), and the actions of plaintiff in compliance with the bulletins (R. 29) and the bulletins and facts so pleaded were admitted in evidence.

D.

Petitioner casually states that "the record indicates he (Swalley) had never received" the first bulletin.

The evidence shows the mailing of that bulletin to Swalley and all the other agents of the Company (R. 143). Swalley testified:

> "I do not recall receiving it: It could have been mailed and I could have received it, but I do not recall receiving it." (R. 112.)

In Swalley's answer he

> "says that he has no recollection of ever having received a copy of defendant's Exhibits 18 and 18a." (R. 38-39.)

which is insufficient under the rules to present an issue.

Conclusion.

Much of petitioner's argument is devoted to matters not pertinent to the grounds for granting the writ of certiorari as cited in the petition. In view of the inhibition of Rule 38, we have refrained from discussing such matters.

The petition presents no ground for the exercise of this Court's jurisdiction. Petitioner's claims at the best are no more than an expression of dissatisfaction with the Circuit Court of Appeals' opinion, which opinion is fully sustained by the evidence in this case.

We respectfully submit that there is no reason for the exercise by this Court of its power to grant a writ of certiorari.

Respectfully submitted,

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